STATE OF MICHIGAN

COURT OF APPEALS

GAVIN CLARKSON,

Plaintiff-Appellant,

V

WASHTENAW COUNTY ELECTION COMMISSION and CATHERINE MCCLARY,

Defendants-Appellees.

UNPUBLISHED
December 21, 2006

No. 269148
Washtenaw Circuit Court
LC No. 05-001332-AA

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders granting summary disposition in favor of defendants and awarding defendant Catherine McClary sanctions. Because the issues concerning the rejected petitions are moot and because the trial court did not clearly err in awarding sanctions, we affirm.

Plaintiff filed this action against defendants based upon the Washtenaw County Election Commission's rejection of recall petitions he filed. Plaintiff sought to recall the Pittsfield Township supervisor, treasurer, and clerk and submitted three recall petitions to the Washtenaw County Election Commission ("Commission"), each containing three separate statements. In a clarity review hearing, the members of the Commission rejected the petitions, based upon a lack of clarity in the third statement of each petition. Plaintiff thereafter filed a two-count complaint against defendants, alleging that the Commission applied an incorrect standard of clarity to the petitions and that defendant Catherine McClary ("McClary") engaged in official misconduct in her review of the petitions. The Commission filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) in lieu of answering plaintiff's complaint, and defendant McClary filed a motion for summary disposition relying upon MCR 2.116(C)(8). The trial court granted the Commission's motion on grounds of mootness, and granted McClary's motion based upon plaintiff's lack of standing to pursue criminal penalties against McClary, and because any request for injunctive relief against McClary implicit in the complaint was moot. McClary was also awarded $1,000.00 in sanctions.

Appellate review of a motion for summary disposition is de novo. *Spiek v Transportation Dep't*, 456 Mich 331, 337; 572 NW2d 201 (1998). While defendants' motions were premised upon MCR 2.116(C)(8) and (10), it appears that the trial court granted summary disposition for defendants under MCR 2.116(C)(4), which applies in cases in which "[t]he court

lacks jurisdiction of the subject matter." MCR 2.116(C)(4). Because judicial power is the right to determine actual controversies arising between adverse litigants, a court hearing a case in which mootness has become apparent would lack the power to hear the suit. *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 255 n 12; 701 NW2d 144 (2005). A reviewing court may review a trial court's summary disposition ruling under the correct subrule. *Spiek, supra.*

Plaintiff first argues on appeal that despite the fact that he filed subsequent petitions with respect to the three township employees and the same were found to be sufficiently clear to proceed, the issue concerning clarity of the prior petitions is not moot. We disagree.

Recalls of elected officials in Michigan are governed by MCL 168.951 *et seq.* Subsection 952(1) sets forth the requirements for a recall petition. It reads, in relevant part, as follows:

> A petition for the recall of an officer shall meet all of the following requirements:
>
> * * *
>
> (c) State clearly each reason for the recall. Each reason for the recall shall be based upon the officer's conduct during his or her current term of office. . .

Subsection 952 further provides:

> (2) Before being circulated, a petition for the recall of an officer shall be submitted to the board of county election commissioners of the county in which the officer whose recall is sought resides.
> (3) The board of county election commissioners, not less than 10 days or more than 20 days after submission to it of a petition for the recall of an officer, shall meet and shall determine whether each reason for the recall stated in the petition is of sufficient clarity to enable the officer whose recall is sought and the electors to identify the course of conduct that is the basis for the recall. . .

Here, plaintiff submitted three recall petitions that were rejected by the commission for lack of clarity. Plaintiff subsequently submitted additional recall petitions, which were deemed sufficiently clear. The trial court noted this fact in making its determination that Plaintiff's claim against the Commission was moot: "This Court—and you've explained what this Court's obligation is and I agree with that, except that this Court only hears cases or controversies. . .The fact that the petition has been approved by the Election Commission even though the language, as you say, is somewhat different, makes the whole issue moot for the Court's consideration."

An issue is moot if an event has occurred that renders it impossible for a court to grant relief. *Attorney General v Public Service Com'n*, 269 Mich App 473, 485; 713 NW2d 290 (2005). "Mootness precludes the adjudication of a claim where the actual controversy no longer exists, such as where 'the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Michigan Chiropractic Council v Comm'r of Insurance*, 475 Mich 363, 370-371 n 15; 716 NW2d 561 (2006) (opinion of Young, J), quoting *Los Angeles Co v Davis*, 440 US 625, 631; 99 S Ct 1379; 59 L Ed 2d 642 (1979) (internal citations omitted).

Because the most critical element of the judicial power requires that a case contain a genuine controversy between the parties, we must ensure one exists before exercising judicial authority. *Michigan Chiropractic Council, supra* at 373-374.

It is undisputed that mere weeks after the petitions at issue were rejected for lack of clarity, plaintiff submitted petitions containing somewhat different language, but concerning the same three elected officials. These petitions were accepted as clear, and plaintiff has proceeded with these petitions. Because similar petitions were accepted, even if we felt that rejection of the initial petitions was in error, we could not fashion a remedy that would place plaintiff in any different position than he now stands. He has, for all intents and purposes, obtained the exact same relief this court could have given—acceptance of clear petitions that would allow him to proceed with his recall efforts. Although slightly different in language, the accepted petitions undisputedly govern the same three officials and the same complained-of conduct. There is, then, no continued controversy and no remedy to be had by plaintiff. The issue is moot.

While an exception to the general rule of mootness exists where the issue is one of public significance and capable of repetition yet evading judicial review, we find no exceptional circumstances in this case requiring us to render a decision on the merits. See *City of Los Angeles v Lyons*, 461 US 95, 109; 103 S Ct 1660; 75 L Ed 2d 675 (1983).

Plaintiff also argues that the commission erroneously rejected clear language in the recall petitions using a higher standard of clarity than it had applied to previous petitions. However, because we find the issues concerning the rejected petitions moot, we need not address the clarity of the petition language.

Plaintiff next argues that he sought declaratory/injunctive relief against McClary to prevent her from exceeding the scope of her authority during clarity review hearings and that the trial court erred in granting summary disposition in McClary's favor. We disagree.

In his complaint, plaintiff alleged that defendant McClary based her decisions as to the clarity of the petitions upon her own opinions as to the validity of the allegations, rather than on clarity alone. Plaintiff then alleged that pursuant to MCL 750.478, McClary's actions constituted a misdemeanor, punishable by up to 1 year in prison and a $1,000.00 fine. Plaintiff's specific request for relief with respect to McClary's actions was "to find that Defendant McClary's actions constituted official misconduct. Plaintiff further asks this court to admonish, fine, or otherwise punish Defendant McClary to the fullest extent of the law for her willful and repeated misconduct in violation of both MCL 168.952 and MCL 750.478."

MCL 750.478, part of the Michigan Penal Code, provides that the willful neglect of duty by public officer or person holding public trust or employment is a misdemeanor, punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00. Our Legislature enacted the penal code to, among other things, define crimes and prescribe the penalties for crimes, i.e., the code defines what acts are offenses against the state. *People v Williams*, 244 Mich App 249, 252-253; 625 NW2d 132 (2001). The authority to prosecute for violation of those offenses is vested solely with the prosecuting attorney. *Id.;* Const. 1963, art. 7, § 4; MCL 49.153. A prosecutor, as the chief law enforcement officer of a county, is granted the broad discretion to decide whether to prosecute or what charges to file. *People v Jackson*, 192 Mich App 10, 15; 480 NW2d 283 (1991). Because the decision whether to bring criminal charges

against a person lies exclusively with the prosecution, plaintiff has no standing to seek criminal penalties against McClary.

While plaintiff contends he was seeking declaratory or injunctive relief against McClary rather than criminal sanctions, that is not evident from the face of the complaint. Rather, the gist of plaintiff's request for relief appears to be punishment of McClary.[1]

Plaintiff's claim against McClary is also moot. Whatever reason McClary had for rejecting the initial petitions submitted by plaintiff is irrelevant. She approved an amended version of the petitions and plaintiff has proceeded with the same. There is thus no present case or controversy concerning McClary's actions in rejecting the initial petitions. If McClary exceeded the scope of her authority or acted improperly in rejecting the initial petitions, the wrong has been righted by acceptance of revised petitions a few weeks later.

Finally, Plaintiff contends that the court erred in awarding sanctions to McClary. Plaintiff asserts that the action against McClary was not frivolous, and that the trial court's imposition of sanctions was improper as this issue involved a public question. We disagree.

A trial court's finding that an action is frivolous is reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). A decision is clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made. *Id.* at 661-662. The amount of sanctions imposed is reviewed for an abuse of discretion. *In re Costs & Attorney Fees*, 250 Mich App 89, 104; 645 NW2d 697 (2002).

MCR 2.114 provides, in relevant part:

> (D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well-grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (E) Sanctions of Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction. . .

---

[1]While an order allowing plaintiff to file an amended complaint was entered, it does not appear that an amended complaint was filed.

MCR 2.114(F) provides that, in addition to sanctions, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)("if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591").[2]

Here, the trial court noted that plaintiff's complaint, which included penalties to be imposed on McClary, was a serious matter, and that plaintiff was made aware on several occasions that he had no standing to pursue an action against McClary under MCL 750.478 because that was a prosecutorial function. While plaintiff stated on the record that he was not seeking criminal penalties against McClary, the trial court noted that the assertion was still in his complaint and he had not stipulated to anything different with respect to the claim against McClary. Given the above, we cannot conclude that the trial court clearly erred in imposing sanctions against plaintiff.

Further, we reject plaintiff's argument that sanctions are not appropriate when the issue is one of public concern. First, the cases cited by plaintiff concerning a public question address the imposition of costs, not sanctions. Second, "[w]hile we do frequently refuse to award costs in cases involving pubic questions, this is hardly a 'rule of law' such that failure to adhere to it constitutes an abuse of discretion." *Village Green of Lansing v Board of Water and Light*, 145 Mich App 379, 395; 377 NW2d 401 (1985). Thus, while a trial court does not abuse its discretion by declining to award costs because a public question is involved, logically, this means a trial court has the discretion to impose costs notwithstanding a public question, in an appropriate situation. *Id.*

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

---

[2] MCL 600.2591 provides that it the court finds that a claim or defense is frivolous, the court shall award to the prevailing party costs and fees incurred by that party in connection with the action. While it does not appear that the trial court awarded McClary specific costs, McClary has not appealed any ruling made by the court with regard to the sanctions/costs awarded.